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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAYNE AINSWORTH,

Defendant and Appellant.

A145000

(Alameda County  
Super. Ct. No. 175136B)

Defendant Dwayne Ainsworth appeals a judgment sentencing him to 21 years in state prison for the commission of a robbery, which sentence was enhanced for the commission of prior felonies. Defendant's sole contention is that he is entitled to a remand for resentencing because the trial judge misunderstood the scope of his discretion when imposing sentence. The record reveals no such misunderstanding and we shall affirm the judgment.

**Factual Background**

Since defendant does not challenge his conviction for the commission of second degree robbery (Pen. Code, § 211),<sup>1</sup> it is unnecessary to relate the facts of the crime. Defendant, along with a codefendant, was charged with that offense in a single count information. The information also alleged that defendant had served six prior prison terms (§ 667.5, subd. (b)) and had been convicted of three strike offenses (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)). During jury selection, defendant waived his right to

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<sup>1</sup> All statutory references are to the Penal Code.

a jury trial with the agreement that “life would be taken off the table, meaning that [defendant’s] maximum exposure would be 25 years.” The prosecutor amended the information so that the three alleged strike offenses would have the effect of a single strike offense, doubling defendant’s potential sentence for the robbery instead of exposing him to life imprisonment. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)).

Two days later, before the start of the court trial, the judge confirmed with counsel his understanding of his sentencing options in the event of a conviction. The judge stated: “We’re at the stage now where we’re in a trial where the jury was waived upon the condition that the minimum would be 17 years and the maximum 25 years. . . . The way I feel it’s calculated, and that’s what I just wanted to get verification for, is [defendant] is charged with a robbery. That robbery carried a possible term by itself of two years, three years or five years. [Defendant] is also charged with three prior convictions, and those three prior convictions have an effect in two ways; each of them carries an effect as a strike and each of them carries an effect as a five-year prior. What that means is there are three strikes; however, they don’t have the effect of a strike prior as three strikes. It’s just each one has a strike effect as one strike. So there is no life on the table. Life is not a possible sentence in this case. However, each of those priors, in addition to having the effect of a strike, is also each a five-year prior. So, I believe that the way we get to the 17 years is if I, in my discretion, *Romero*<sup>[2]</sup> each of the three strikes as a possible strike, then I’m left with the robbery which carries a sentence of two, three or five years. But then I have the five-year effect for each of the three five-year priors and that cannot be *Romero*’d. So [if] I give the low term of two years on the robbery, and five years for each of the three 5-year priors, that’s two plus five, plus five, plus five. That’s how we get to the 17. Now my understanding is if there is no *Romero* of each of the three strikes, which only have a one strike effect, then I would, by law, have to sentence [defendant] as follows: It could be a maximum . . . . And life is not the possible sentence anymore. Five years on the robbery because of any one of the three strikes. It

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<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

could be – it would have to be double [to] 10 years. And then I would have to add each of the five-year priors. So that would be five times two equals ten; plus five, plus five, plus five, which would be 25 years. [¶] Now, that’s my understanding, and obviously *Romero* hasn’t even been addressed yet, but *Romero* would apply to each of the three strikes, individually. In other words . . . to actually prevail in a *Romero* motion, you have to win the *Romero* motion three times.”

At the sentencing hearing following defendant’s conviction, defense counsel urged the court to impose the midterm for the robbery conviction and “ask[ed] the court to consider striking one or more of the prior convictions because he had started to work this time in prison.” The prosecutor urged the court to impose the aggravated term for the robbery. Then the prosecutor stated: “If one of the priors were to be stricken, the only thing stricken for purposes of it is under 667(e); it’s not stricken for purposes of 667(a). Simply, the law doesn’t support that. And so striking any of the priors for purposes of 667(e) does not remove the fact that we double the base term. And for 667(a), we add five years, no matter whether or not any of the priors are *Romero*’d.” Neither defense counsel nor the court expressed any disagreement with this statement, and the matter was promptly submitted.

The court then stated: “I do have to exercise my discretion under *Romero*. *I understand that it would lose the five-year effect.* In a strange way, it actually makes it eligible for probation if there were no strike priors. But considering everything I know about the case, since I did hear the evidence on the three prior convictions and have read the probation report, I will deny the *Romero* motion. That being said, I think it deserves to be emphasized that this was a three-strike case; and if he had been convicted by a jury, [defendant] would be serving life. I wouldn’t have any leeway at all. So now the question is whether you get 17 years or 25 years. And the real question in my mind is not the low term. The real question is whether you get three years or five years, which is doubled, and then you add 15 years to that. And the way the rule works is you start at the mid-term, and you go down if it deserves it.”

The court imposed the midterm of three years, doubled to six years, and imposed the three 5-year enhancements for a total 21-year prison term. Defendant has timely appealed.

### **Discussion**

Defendant is of course correct that he is entitled to be sentenced by a court aware of its discretionary powers, exercising “informed discretion.” (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) However, we cannot agree that the record reveals any meaningful lack of understanding by the court of its discretionary authority in this case. Relying on the cryptic sentence italicized above, that the court “would lose the five-year effect” if it granted the *Romero* motion, defendant argues that the court “either forgot or was misinformed about the law when it later denied the *Romero* motion.” While it is not clear what the court meant by that phrase, from the extended discussion that took place before the start of trial, it is clear that the court understood that if it granted the *Romero* motion and struck the priors, it would still have been necessary under section 667, subdivision (a) to add to the sentence five years for each of the three prior convictions.<sup>3</sup> This fact was emphasized by the prosecutor, without exception by the court or defense counsel, immediately prior to the court imposing sentence. The court never questioned that upon conviction defendant faced a minimum term of 17 years, which necessarily required imposing five years for each of the three priors, even if the *Romero* motion had been granted.

The court was mistaken that granting the *Romero* motion would have rendered defendant eligible for probation (see § 1203.08, subd. (a)), but that misunderstanding was immaterial. The court clearly understood that it had discretion to grant the motion and there is no indication that it considered defendant’s eligibility for probation a factor in determining whether to exercise that discretion. To the contrary, the court’s explanation of its sentence made clear that it knew it had discretion to grant the *Romero* motion, and that it relied on proper reasons for exercising that discretion to deny the motion.

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<sup>3</sup> Section 1385, subdivision (b); *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268.

Defendant's extensive criminal history plainly supported the court's exercise of discretion. (E.g., *In re Large* (2007) 41 Cal.4th 538, 552.)

**Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Jenkins, J.